United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF AND APPENDIX

76-4250

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

- -

ANGEL DONAY ALVARADO-SANTOS,

Petitioner,

-against-

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

- -

PETITIONER'S BRIEF AND APPENDIX

- -

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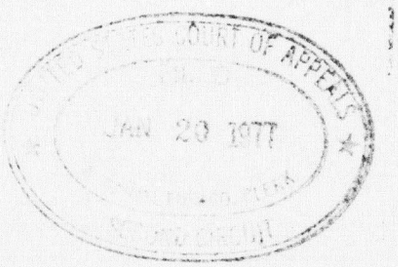

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CASES CITED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -

ANGEL DONAY ALVARADO-SANTOS,

Petitioner,

-against-

Docket No.
76-4250

IMMIGRATION & NATURALIZATION SERVICE,

Respondent

- -

PETITIONER'S BRIEF

Statement of the Issues

1. Whether the Immigration Judge erred in not permitting petitioner to testify at the deportation hearing as to the preliminary "reasonable suspicion" set forth in the statute as a preliminary issue to determine the validity of petitioner's arrest.

2. Whether the Immigration Judge erred in not permitting any evidence to be received, notwithstanding the service upon Immigration & Naturalization Service and the Judge of petitioner's motion to suppress and request to give testimony as to the facts and circumstances of said arrest.

3. Whether the petitioner's Fourth Amendment rights were violated under the circumstances of his being arrested without any interrogation, probable cause or reasonable suspicion as to his illegal status in the United States.

Statement of this Proceeding
Pursuant to Sec. 106(a) of the Immigration & Nationality Act, 8 U.S.C. Sec. 1105(a)

The petitioner petitions this Court for review of an order granting him voluntary departure in lieu of deportation entered against him by the Board of Immigration Appeals on July 19, 1976.

Statute Involved

Immigration and Nationality Act, Sec. 287, 8 U.S.C. 1357, provides in relevant part:

> (a) "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant - (1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;
>
> (2) To arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States; * * * * "

The Facts

Petitioner is a native and citizen of El Salvador who entered the United States on or about July 15, 1974 without being inspected.

On September 18, 1975, petitioner was working in a restaurant in Westbury,New York, as a chef dressed in a white uniform. Immigration officers entered the restaurant, abruptly came over to him, seized and arrested him and took him under custody to the Immigration Detention Facility loca-

ted on Flushing Avenue in Brooklyn, New York. Petitioner claims that no questions were asked of him or of his employer regarding his status in the United States or anything that would give the arresting Immigration officers "reasonable suspicion" to believe that he was in the United States illegally.

Subsequent to petitioner's arrest, he was served with an order to show cause dated September 19, 1975 (A-31) and appeared at a deportation hearing on October 21, 1975. Prior to the commencement of the deportation hearing, petitioner served an affidavit and notice upon the Trial Attorney for the Immigration Service and handed the original thereof to the Immigration Judge, asserting that petitioner wished to give sworn testimony and evidence relating to the facts and circumstances of his arrest which was claimed to be unwarranted, unlawful and not based upon any reasonable suspicion. The said affidavit and notice (A29-30) was received by the Immigration Judge during the deportation hearing as Exhibit 2.

Notwithstanding petitioner's expressed claim that he wished to give testimony on this issue, the Immigration Judge denied such application without offering petitioner any opportunity to testify about the facts and circumstances surrounding his arrest.

The Immigration Judge at the hearing asked petitioner whether the allegations in the order to show cause were true. Objection was made at that time on behalf of the petitioner, asserting that preliminarily petitioner wished to present testimony as to the claim of unlawful and unwarranted arrest. Obviously petitioner wished to adduce evidence to the ef-

fect that there was no reasonable suspicion or probable cause to have arrested him in order to shift the burden of proof on the Immigration Service to justify the validity of the arrest and as to whether there was any reasonable suspicion to have so arrested him.

The Immigration Judge, however, overruled the objection and would not permit the petitioner to offer any proof as to the facts and circumstances surrounding his claimed illegal arrest. It was only over the petitioner's objections as to the admissibility of the information secured as a direct result of the claimed unlawful arrest that petitioner testified, admitting the allegations of the order to show cause. As the allegations of the order to show cause were testified to over the objections of petitioner, his deportability was not conceded. The position of the petitioner is that the information was elicited and obtained only as the result of, and subsequent to, an unlawful arrest without probable cause; thereby not being admissible against him.

At the hearing prior to the Immigration Judge's decision, the petitioner again demanded an opportunity to present testimony. This was refuse by the Immigration Judge.

In the alternative, petitioner's attorney requested an opportunity to state an offer of proof as to what the alien would testify to, to have a record, at least, as to the claimed facts constituting an unlawful arrest without reasonable suspicion. This was also refused by the Immigration Judge.

The following appears at pages 2-3 of the transcript of the hearing:

"IMMIGRATION JUDGE: Mr. Oltarsh, the original Order to Show cause is received as Exhibit 1.

IMMIGRATION JUDGE TO RESPONDENT:

Q. Mr.Alvarado, are these things Immigration says about you each true. First, that you w;ere born in El Salvador and are a citizen of El Salvador?

MR. OLTARSH: Objection at this time your honor. I have previously served upon the Immigration Service a notice that the respondent asserts a claim that he was seized and arrested without any justification.

IMMIGRATION JUDGE: Are you asking that this be received into evidence?

MR. OLTARSH: Yes, sir.

IMMIGRATION JUDGE: All right, we will receive that as Exhibit 2 after showing it to the Trial Attorney.

MR. OLTARSH: I would just like to say that I object to the question at this time and request your Honor's permission to interrogate the alien preliminarily as to the facts underlining and surrounding his arrest in order that it may be determined whether there is sufficient proof to shift the burden of proof to the government as justifying grounds of his arrest.

IMMIGRATION JUDGE: The objection is overruled. We will proceed on the Order to Show Cause at this time and maygive consideration later to your additional request.

IMMIGRATION JUDGE TO RESPONDENT:

Q. Mr. Alvarado?

MR. OLTARSH: Wait a minute. May I just say this your Honor. I noted my objection, or subject to my objection and an opportunity to include the strong request for the respondent to testify I will permit, however, the respondent to answer the questions under the terms of and subject to that objection.

IMMIGRATION JUDGE: Your objection has already been noted on the record."

And at page 8-9 the following:

"MR. OLTARSH: May I interrupt for one moment your Honor. I ask at this time for an opportunity to interrogate the respondent if your Honor is not going to grant me that opportunity I believe that for the record I should be granted an opportunity to briefly state and offer proof as to what the alien would testify and what I intend to prove so that at least there is a record of what the alien had been offering or would offer on the question. May I state an offer of proof in the absence of being permitted to question the respondent.

IMMIGRATION JUDGE: No sir.

MR. OLTARSH: I may not even state anything to do with the basis of his arrest or seizure?

IMMIGRATION JUDGE: No, sir.

MR. OLTARSH: There was claim that he was seized without any conversation, inquiry, permission to enter the restaurant or any discussion whatsoever. He was merely seized without a word and put in handcuffs and taken right to Immigration.

NOTE: At this point in the proceedings the Immigration Judge delivered an oral statement of his decision in this matter. This has been transcribed separately and is attached.

* * * * * * * * * * *

MR. OLTARSH: I note my objection. May I just note it for the record.

IMMIGRATION JUDGE: Your objection is noted.

MR. OLTARSH: And not being afforded an opportunity to state an offer of proof.

IMMIGRATION JUDGE: Your objection is noted sir."

The Immigration Judge thereafter rendered his decision, finding the respondent deportable, but granting him voluntary departure.

POINT I

THERE WAS NO EVIDENCE ADDUCED AT THE DEPORTATION HEARING TO ESTABLISH "REASON TO BELIEVE THAT THE ALIEN WAS IN THE UNITED STATES IN VIOLATION OF LAW OR REGULATION". NO PROBABLE CAUSE WAS ESTABLISHED TO HAVE WARRANTED THE SEIZURE OR ARREST OF RESPONDENT.

The statute referred to previously, Sec. 287(a)(2), requires reason to believe that the alien is in the United States in violation of law or regulation before a valid arrest can be made. The "reason to believe" referred to in the statute has been analogized to "probable cause" which traditionally underlies criminal arrests. La Franca v. INS, 413 F 2d 686, 689 (2nd Cir. 1969).

In the instant case the Immigration Judge refused to permit the respondent to describe the facts and circumstances surrounding his arrest and detention, notwithstanding the admission into evidence of Exhibit 2, which alleged that alleged respondent had been unlawfully arrested.

Thus, in effect, the Immigration Judge held that no matter what the circumstances of a seizure or arrest of an alien in the United States, no issue can be raised as to the legality, reasonable suspicion, or lack of probable cause of such an arrest.

It is respectfully submitted that this is not the law.

In a recent case, Jose Gil Ojeda-Vinales v. INS, Docket 74-2634, decided September 23, 1975, by the U. S. Court of Appeals, Second Circuit, the Court sustained the validity of the arrest therein only by a finding that there was probable cause because of information supplied to the Immigration Service in the nature of a complaint that a specifically described illegal alien named Jose was working as a mechanic at a specified address. Officers went to that address and were advised by the garage owner that a person of that description was in fact employed there. On these particular facts the Court of Appeals held that there was a reasonable suspicion to establish probable cause to interrogate and arrest the alien.

The Court stated in Ojeda-Vinales (supra):

"Section 287(a)(1) permits I.N.S. officers to interrogate and temporarily detain an alien upon circumstances creating a reasonable suspicion, not rising to the level of probable cause to arrest, that the individual so detained is illegally in this country.' Au Yi Lau v. I.N.S., 445 F. 2d 217, 223 (D.C. Cir. 1971)."

Obviously, if no requirement of reasonable suspicion was necessary, the Court of Appeals would not have spent four pages in Ojeda-Vinales discussing probable cause and reasonable suspicion necessary to arrest an alien. See U.S. v. Salter, slip op. page 5647 (2d Cir.) 8-15-75; U. S. v. Brignoni Ponce --- U.S. ---, 43 U.S.L.W. 5028, 5032, U. S. June 30, 1975.)

Accordingly, it is respectfully submitted that the Immigration Judge erred in refusing to permit the petitioner to testify as to the facts and circumstances surrounding his claimed unlawful arrest. No evidence of a reasonable suspicion was established by the Immigration Service.

The only evidence adduced at the deportation hearing was the evidence objected to by the respondent insofar as admissibility was concerned. The Immigration Judge totally disregarded the objections to admissibility of this evidence and found him deportable on this testimony.

It is respectfully submitted that the respondent, over objection, did not deny his country of birth, his citizenship or the other allegations contained in the order to show cause. The truth of the allegations would have been conceded but their admissibility is what was being challenged; as having been unlawfully obtained subsequent to an illegal arrest.

It is analogous to a criminal defendant admitting that the object which a District Attorney holds up in Court is a revolver or a container of heroin, but contests admissibility against him by reason of an illegal or

unlawful arrest and search, and the improper obtention of the evidence. Obviously, no one would deny the actual fact that the revolver is a revolver, or that the blackjack is a blackjack. What is being contested is not the truth of the item's identity (in this case that of the petitioner himself), but the admissibility of the evidence challenged by a claim of unlawful arrest without probable cause.

POINT II

AS NO PROBABLE CAUSE NOR ANY REASONABLE SUSPICION WAS ESTABLISHED TO JUSTIFY THE SEIZURE AND ARREST OF PETITIONER, PETITIONER SHOULD HAVE BEEN PERMITTED TO TESTIFY, THE MOTION TO SUPPRESS GRANTED, AND THE PROCEEDINGS TERMINATED.

The Immigration Service has never disputed that the Fourth Amendment to the U. S. Constitution protects aliens as well as citizens. U. S. v. Brignoni-Ponce (supra); Almeida-Sanchez v. U. S., 413 U. S. 266. At the very least, by reason of the petitioner's claim of an unlawful arrest and the absence of probable cause or reasonable suspicion, the petitioner should have been afforded an opportunity to testify at the deportation hearing. If his testimony established prima facie lack of reasonable suspicion or probable cause, the burden of proof would then be shifted to the Immigration Service to establish the probable cause and reasonable suspicion necessary to justify the arrest herein.

The Immigration Judge failed and refused to afford the petitioner his constitutional right to prove that the government had in fact engaged in the unlawful and illegal activity resulting in his arrest and the obtaining of the information against him.

U. S. v. Brignoni-Ponce (supra), has now settled that an immigration

investigation or detention must be based on "reasonable suspicion". In the instant case there is not a scintilla of evidence as to the basis, probable cause, or reasonable suspicion necessary to have justified the petitioner's arrest.

The rights of the petitioner are subject to the rule in Terry v. Ohio, 392 U. S. 1, where it was stated that the stopping of a person must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion". The evidence herein, it is respectfully submitted, falls short of the standards for reasonable suspicion and probable cause. Brinegar v. U.S., 338 U. S. 160; Smith v. U. S., 358 F. 2d 833.

It is elementary that a hunch or conclusion based on good faith may not be sufficient basis for an intrusion into a person's right to be free from illegal search and seizure. Terry v. Ohio, (supra). There must be more than mere suspicion to justify an arrest. It must be a reasonable suspicion.

If we assume, as asserted by petitioner, that the arresting officer never interrogated him at all, did not obtain permission of his employer but merely - perhaps upon petitioner's physical appearance - immediately arrested him, any subsequent statement or admission made after this arrest was violative of his constitutional rights and should have been suppressed.

The question of alleged illegal police action and its effect on the admissibility of information obtained has been reviewed by the Supreme Court of the United States in the Silverthorne-Nardone-Wong Sun trilogy (Silverthorne Lumber Company v. U. S., 251 U. S. 385; Nardone v. U. S., 308

U. S. 338, and Wong Sun v. U. S., 371 U. S. 471) which cases developed the doctrine known as the "fruit of the poisonous tree".

"Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry whether these intrusions be termed 'arrests' or 'investigatory detentions'." Davis v. Mississippi, 394 U. S. 721, 726-27, 89 S. Ct. 1394, 1397).

Moreover, the Supreme Court stated: "Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain between the illegal arrest and the statements made subsequent thereto to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint'. (Wong Sun v. U. S.; 371 U. S. at 486). Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment."

The unlawful stopping of the petitioner and his arrest has unveiled the question of whether or not there has been an initial tainting of the respondent's subsequent statements to the arresting officer. It is apparent that the arresting officer exerted a compelling influence over any "voluntary" statements made by petitioner subsequent to his arrest.

Based upon the totality of the circumstances of this case, it should be held that the initial stopping of the petitioner and his unwarranted detention created a primary taint that was exploited to induce petitioner's subsequent statements and admissions. There was no evidence adduced to

sufficiently dissipate that primary illegality or lack of "reasonable suspicion". This case has established a clear-cut nexus between the primary illegality of the arrest and the subject matter of the petitioner's motion to suppress.

The petitioner's motion to suppress the evidence and information obtained unlawfully and without reasonable suspicion, should have been granted.

The petitioner also respectfully refers to the recent decision in Illinois Migrant Council et al v. Pilliod, et al. (DD-Chicago) District Court, Northern District Illinois, Eastern Division, #74 C 3111 (7/29/75), where the Court granted a preliminary injunction against INS-Chicago, restraining it from mass raids on factories, dormitories and from stopping people on the street just because (in that case) they looked Mexican and with little or no probable cause. There is a full discussion on INS authority as against the protection of the Fourth Amendment, citing inter alia, Terry v. Ohio (supra) and U.S. v. Brignoni-Ponce (supra).

Also see U. S. v. Karathanos, Eastern District, New York, #75-456 (8/1/75). There the Court granted a motion to suppress evidence taken in an INS raid of premises where illegal aliens were found. Defendants having been charged with harboring and concealing under 8 USC 1324, the Court determined that the affidavit of INS investigator, which was the basis of the Federal Magistrate's search warrant, was insufficient to show probable cause with a discussion by the Judge of what constitutes probable cause.

POINT III

THOUGH DEPORTATION CASES HAVE HELD TO BE CIVIL IN NATURE, FOURTH AMENDMENT PROTECTIONS ARE APPLICABLE TO PETITIONER. THE UNLAWFUL ARREST AND SEIZURE OF PETITIONER SHOULD RESULT

IN AN ORDER OF SUPPRESSION AND A TERMINATION OF THE PROCEEDINGS.

It has been held that deportation cases are not criminal in nature. Judge Kaufman in a recent decision in this Court, Lennon v. INS, decided on October 7, 1975, stated regarding deportation:

> "But in severity it surpasses all but the most Draconian criminal penalties."

The exclusionary rule under the Fourth Amendment has been applied to civil proceedingswhich involve intra-sovereign violations. In other words, where Federal officers violate a person's Fourth Amendment rights the illegally-obtained information may nevertheless be suppressed although the proceedings are civil rather than criminal.

Pizzarello v. U. S., 408 F. 2d 579; Knoll Associates Inc. v. F.T.C. 397 F. 2d 530; Powell v. Zuckert, 366 F. 2d 634; U. S. v. Blank, 261 F. Supp. 180.

Illegally obtained evidence has been held inadmissible in deportation proceedings. Ex parte Jackson, 263 Fed. 110 (D.C. Mont. 1920), appeal dismissed sub nom. Andrews v. Jackson, 267 Fed. 1022 (9th Cir. 1920).

Illlegally obtained evidence has been likewise excluded in civil action to recover duties on records imported into the United States, Rogers v. United States, 97 F. 2d 691 (CA 1. 1938), has been barred in civil assessment proceedings where it had been offered to show the operation of a business having taxable income consequence. Tover v. United States, 83 F. Supp. 47 (N.D. Ill. 1948); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962). It has been ruled out in a proceeding instituted to effect the mere discharge of a civil service employee. Powell v. Zuckert, supra.

The evidentiary exclusions called for by the Fourth and Fifth Amendments are not only applicable to criminal cases. These Amendments are imperative under the Bill of Rights if society is to protect its zone of deep privacy.

As Judge Brandeis said in Olmstead v. United States, 277 U. S. 438, 478 (1928)(dissenting opinion) . . . 'the right to be left alone - the most comprehensive of rights and the rights most valued by civilized men'. The Fourth Amendment reflects a proper consideration of the effect of searches and seizures by anyone, public official or private individual, upon the search victim. The rule of exclusion is a judicially created remedy designed to implement Fourth and Fifth Amendment rights. United States v. Calandra, 414 U. S. 338, 348 (1974). Nothing in the Fourth Amendment forbids applying Constitutional prohibitions to private suits, private acts, governmental actions unrelated to criminal ones. The Amendment does not distinguish between criminal and civil. Its mandate is absolute.

Courts should not become accomplices in permitting benefits to flow from lawless acts and whether the search or arrest is governmental or private, it is lawless and illegal unless supported by a properly issued arrest and search warrant. "When Judges" wrote Judge Brennan in his dissenting opinion in Calandra "appear to become accomplices in the willful disobedience of a Constitution they are sworn to uphold, we imperil the free foundation of our beliefs, trust in their government on which our democracy rests". U. S. v. Calandra, (supra) at 360.

The Supreme Court in its last term considered the rule of exclusion in U. S. v. Janis, --- U. S. ---, 96 Sup. Ct. 3021. A civil action had been brought by Janis in a U. S. District Court for an income tax refund. The argument was advanced that the sole basis for the computation of the civil tax assessment was on illegally procured evidence. Janis prevailed in the District Court and the U. S. Court of Appeals for the Ninth Circuit. The Supreme Court granted certiorari and the issue squarely presented in this case was whether evidence unconstitutionally seized by a State criminal law enforcement officer was admissible in a civil proceeding by or against the United States.

Mr. Justice Blackman, writing for the majority, indicated that the doo is not closed with regard to applying the exclusionary rule to civil proceedings involving governmental parties.

The Janis case, however, held that the evidentiary rule of exclusion as judicially evolved need not be extended to civil actions involving the Federal Government where the illegally seized documents derive from separate and unwarranted State activities. Left open, however, and of major importance was the non-resolution of the problem and any indication of the position to be taken by the Court if the acts complained of were intra-sovereign. In other words, if a wrongful seizure was made directly by a Federal official, the Court might well have ruled differently. The Court stated that this intra-sovereign problem was not presented by the Janis case and they would not pass on the question of whether the exclusionary rule is to be applied in a civil proceeding involving an intra-sovereign violation.

At the very least, the Janis case de-emphasizes the Supreme Court's previous dependence upon criminal or quasi-criminal necessity as a factor in its definition of proceedings falling within the protective sweep of the Fourth Amendment's prohibition against unlawful arrests or seizures.

The Janis case was purely a civil suit for refund of income taxes paid and was nothing but a purely civil action at law.

The Supreme Court in Janis reserved the right to reconsider the point if determined that Federal officials were involved in the illegal obtention of evidence.

Many scholars and writers believe that the exclusionary rule deserves unlimited application and that it should apply equally in criminal proceedings or civil actions. All tainted evidence should be excluded, irrespective of the nature of the proceedings, the forum or the parties.

Conclusion

It is respectfully submitted that by reason of the above and in view of the refusal of the Immigration Judge to permit the petitioner to testify as to the facts and circumstances surrounding a claimed illegal and unlawful arrest, the motion to suppress should have been granted and the proceedings terminated. The decision of the Board of Immigration Appeals should be reversed and the deportation proceedings against petitioner terminated.

Respectfully submitted,

DAVID E. OLTARSH
Attorney for Petitioner
225 Broadway
New York, N. Y. 10007

INDEX OF RECORD OF PROCEEDINGS

Deportation Proceedings Re: Angel Donay Alvarado-Santos
File A21 055 475

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

File: A21 055 475 - New York

In re: ANGEL DONAY ALVARADO-SANTOS

JUL 19 1976

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David E. Oltarsh, Esquire
225 Broadway
New York, New York 10007

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Entered without inspection

APPLICATION: Termination of proceedings

In a decision dated October 21, 1975, the immigration judge found the respondent deportable as an alien who entered without inspection in violation of section 241 (a)(2) of the Immigration and Nationality Act and granted him the privilege of voluntary departure in lieu of deportation. The respondent has appealed from that decision. The appeal will be dismissed.

At the hearing before the immigration judge, the respondent admitted the allegations in the Order to Show Cause, specifically, that he is not a citizen of the United States, that he is a native and citizen of El Salvador, and that he last entered the United States on or about July 15, 1974 at which time he was not inspected by the Immigration and Naturalization Service.

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Through counsel, however, the respondent denied his deportability on the ground that the evidence of deportability had been illegally obtained and should therefore be suppressed. The immigration judge denied counsel's motion to suppress the evidence obtained as a result of the arrest and denied his request for an opportunity to present evidence on this issue.

Although evidence actually seized during an illegal arrest may be suppressed in a criminal proceeding, the mere fact of illegal arrest does not invalidate the subsequent deportation proceeding. U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923); Guzman-Flores v. INS, 496 F.2d 1245 (7 Cir. 1974); La Franca v. INS, 413 F.2d 686 (2 Cir. 1969); Matter of Li, Interim Decision 2451 (BIA 1975). The contention that the physical presence of an alien is "evidence" that may be suppressed as the "fruit of the poisonous tree" if the alien was illegally arrested was flatly rejected by the court in Guzman-Flores v. INS, supra, and to our knowledge has no judicial support. See also Matter of Burgos and Burgos-Godoy, Interim Decision 2375 (BIA 1970).

There is no evidence in the record which was obtained as a result of the respondent's arrest. The respondent's testimony at the deportation hearing, without more, clearly establishes his deportability. Thus, inquiry into the facts surrounding the respondent's arrest is unnecessary. See Guzman-Flores v. INS, supra; Klissas v. INS, 361 F.2d 529 (D.C. Cir. 1966). In these circumstances the immigration judge's denials of counsel's motion to suppress and counsel's request to present evidence on this issue were correct.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 31 days from the date

of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

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NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO:

IMMIGRATION AND NATURALIZATION SERVICE

20 West Broadway
New York, N. Y. 10007

Fee Stamp

In the Matter of: ALVARADO-
ANGEL DONAY ~~ALVARDO~~-SANTOS

File No. A 21 055 475

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated October 21, 1975, in the above entitled case.

2. Briefly, state reasons for this appeal. (a) The refusal by the Immigration Judge to permit the alien to testify or receive any testimony whatsoever from the respondent, who previously pursuant to notice had demanded the right to offer sworn testimony as to the circumstances and facts leading up to and surrounding his arrest was erroneous. There was claim made that the respondent was seized and arrested without any conversation, identification, probable cause or justification. The Immigration Judge refused to permit any testimony whatever on respondent's behalf to substantiate the illegality or lack of probable cause of the arrest herein and to shift the burden to I.&N.S. to justify the arrest.

(b) Failure to subpoena and produce material witnesses at the hearing per respondent's request.

(c) Failure of the Immigration Judge to permit the alien to make an offer of proof notwithstanding his refusal to permit testimony and failure to base his determination upon legally admissible evidence.

3. I do not (do / do not) desire oral argument before the Board of Immigration Appeals in Washington, D. C.

4. I am (am / am not) filing a separate written brief or statement.

Angel Donay Alvarado-Santos / David E. Oltarsh
Signature of Appellant (or attorney or representative)

DAVID E. OLTARSH
(Print or type name)

October 30, 1975
Date

225 Broadway
Address (Number, Street, City, State, Zip Code)

New York, N. Y. 10007

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev. 2-15-71)N

A-4

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Nautralization Service

BOARD OF IMMIGRATION APPEALS

- x

In the Matter of :

ANGEL DONAY ALVARADO-SANTOS, : File No. A21 055 475

Respondent. :

- x

THE FACTS

The respondent was arrested by investigators of the Immigration and Naturalization Service on or about September 18, 1975 in a restaurant located in Roosevelt Field, Westbury, New York. The respondent claims that at the time of his arrest he was working in the restaurant as a chef, and was dressed in a white uniform. No questions were asked of him nor of his employer prior to his arrest. The Immigration officers abruptly came over to him, seized and arrested him, and took him under custody to the Immigration Detention Facility located on Flushing Avenue in Brooklyn, New York. Subsequent to this arrest respondent complied with directions of Immigration officers and supplied identification and other information concerning himself to the officers. He was thereafter served with an order to show cause dated September 19, 1975 as to why he should not be deported from the United States on various charges contained therein.

Bond was posted for the respondent and he appeared at a deportation hearing on October 21, 1975.

STATUTE INVOLVED

A.F

Immigration and Nationality Act, Sec. 287, 8 U.S.C. §1357, provides in relevant part:

(a) "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant - (1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;

(2) To arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States; * * * *

THE DEPORTATION HEARING OF October 21, 1975

Prior to the commencement of the actual deportation hearing, the respondent served an affidavit and notice upon the Immigration Service, and the original upon the Immigration Judge, claiming that the respondent wished to give sworn testimony relating to the facts and circumstances of his arrest, claimed to be unwarranted and unlawful. Said affidavit and notice alleged, among other claims, that "he was arrested by Immigration officers while working in a restaurant and with no probable cause". The said notice was accepted by the Immigration Judge and received in evidence as Exhibit "2". The original order to show cause was received by the Immigration Judge as Exhibit "1".

After preliminary questioning as to the respondent's ability to understand the interpreter, and after he stated his name, the Immigration

Judge asked the respondent whether the allegations in the order to show cause were true. There was an objection at that time on behalf of the respondent asserting a claim that he was seized and arrested without justification and requesting the Judge's permission to preliminarily interrogate respondent in order to establish the facts underlying and surrounding his arrest. This would have enabled the Judge to determine whether there were facts or sufficient proof to shift the burden on the government to justify the validity of the arrest on the basis of reasonable suspicion

The Immigration Judge, however, overruled the objection and would not permit the respondent to offer any proof as to the facts and circumstances surrounding his claimed illegal arrest. It was only over the respondent's objections as to the admissibility of the information secured as a direct result of the claimed unlawful arrest that the respondent testified; admitting the allegations of the order to show cause.

As the allegations of the order to show cause were testified to over the objections of respondent, his deportability was not conceded. The position of respondent is that the information was elicited and obtained only as the result of, and subsequent to, an unlawful arrest without probable cause; thereby not being admissible against him.

At the hearing prior to the Immigration Judge's decision, the respondent again demanded an opportunity to present testimony. This was refused by the Immigration Judge.

In the alternative, the respondent's attorney requested an opportunity to state an offer of proof as to what the alien would testify to,

to have a record, at least, as to the claimed facts constituting an unlawful arrest without reasonable suspicion. This was also refused by the Immigration Judge.

The following appears at pages 2-3 of the transcript of the hearing:

"IMMIGRATION JUDGE: Mr. Oltarsh the original Order to Show Cause is received as Exhibit 1.

IMMIGRATION JUDGE TO RESPONDENT:

Q. Mr. Alvarado, are these things Immigration says about you each true. First, that you were born in El Salvador and are a citizen of El Salvador?

MR. OLTARSH: Objection at this time your honor. I have previously served upon the Immigration Service a notice that the respondent asserts a claim that he was seized and arrested without any justification.

IMMIGRATION JUDGE: Are you asking that this be received into evidence?

MR. OLTARSH: Yes, sir.

IMMIGRATION JUDGE: All right, we will receive that as Exhibit 2 after showing it to the Trial Attorney.

MR. OLTARSH: I would just like to say that I object to the question at this time and request your Honor's permission to interrogate the alien preliminarily as to the facts underlining and surrounding his arrests in order that it may be determined whether there is sufficient proof to shift the burden of proof to the government as justifying grounds of his arrest.

IMMIGRATION JUDGE: The objection is overruled. We will proceed on the Order to Show Cause at this time and may give consideration later to your additional request.

IMMIGRATION JUDGE TO RESPONDENT:

Q. Mr. Alvarado?

MR. OLTARSH: Wait a minute. May I just say this your Honor. I noted my objection, or subject to my objection and an opportunity to include the strong request for the respondent to testify I will permit, however, the respondent to answer the questions under the terms of and subject to that objection.

IMMIGRATION JUDGE: Your objection has already been noted on the record."

And at page 8-9 the following:

"MR. OLTARSH: May I interrupt for one moment your Honor. I ask at this time for an opportunity to interogate the respondent if your Honor is not going to grant me that opportunity I believe that for the record I should be granted an opportunity to briefly state and offer proof as to what the alien would testify and what I intend to prove so that at least there is a record of what the alien had been offering or would offer on the question. May I state an offer of proof in the absence of being permitted to question the respondent.

IMMIGRATION JUDGE: No sir.

MR. OLTARSH: I may not even state anything to do with the basis of his arrest or seizure?

IMMIGRATION JUDGE: No, sir.

MR. OLTARSH: There was claim that he was seized without any conversation, inquiry, permission to enter the restaurant or any discussion whatsoever. He was merely seized without a word and put in handcuffs and taken right to Immigration.

NOTE: At this point in the proceedings the Immigration Judge delivered an oral statement of his decision in this matter. This has been transcribed separately and is attached.
* * * * * * * * ** * * *

MR. OLTARSH: I note my objection. May I just note it for the record.

IMMIGRATION JUDGE: Your objection is noted.

MR. OLTARSH: And not being afforded an opportunity to state an offer of proof.

IMMIGRATION JUDGE: Your objection is noted sir."

The Immigration Judge thereafter rendered his decision, finding the respondent deportable, but granting him voluntary departure.

POINT I

THERE WAS NO EVIDENCE ADDUCED AT THE DEPORTATION HEARING TO ESTABLISH "REASON TO BELIEVE THAT THE ALIEN WAS IN THE UNITED STATES IN VIOLATION OF LAW OR REGULATION". NO PROBABLE CAUSE WAS ESTABLISHED TO HAVE WARRANTED THE SEIZURE OR ARREST OF THE RESPONDENT.

The statute referred to PREVIOUSLY. Sec. 287(a)(2), requires reason to believe that the alien is in the United States in violation of law or regulation before a valid arrest can be made. The "reason to believe" referred to in the statute has been analogized to "probable cause" which traditionally underlies criminal arrests. La Franca v. INS, 413 F. 2d 686, 689 (2nd Cir. 1969).

In the instant case the Immigration Judge refused to permit the respondent to describe the facts and circumstances surrounding his arrest and detention, notwithstanding the admission into evidence of Exhibit "2", which alleged respondent had been unlawfully arrested.

Thus, in effect, the Immigration Judge held that no matter what the circumstances of a seizure or arrest of an alien in the United States, no issue can be raised as to the legality, reasonable suspicion, or lack of probable cause of such an arrest.

It is respectfully submitted that this is not the law.

In a recent case, Jose Gil Ojeda-Vinales v. INS, Docket 74-2634, decided September 23, 1975 by the U.S. Court of Appeals, 2nd Circuit, the Court sustained the validity of the arrest therein only by a finding that there was probable cause because of information supplied to the Immigration Service in the nature of a complaint that a specifically described illegal alien named Jose was working as a mechanic at a specified address. Officers went to that address and were advised by the garage owner that a person of that description was in fact employed there. On these particular facts the Court of Appeals held that there was a reasonable suspicion to establish probable cause to interrogate and arrest the alien.

The Court stated in Ojeda-Vinales (Supra):

> "Section 287(a)(1) permits I.N.S. officers to interrogate and temporarily detain an alien upon "circumstances creating a reasonable suspicion, not rising to the level of probable cause to arrest, that the individual so detained is illegally in this country." Au Yi Lau v. I.N.S., 445 F. 2d 217, 223 (D.C. Cir. 1971)."

Obviously, if no requirement of reasonable suspicion was necessary the Court of Appeals would not have spent four pages in Ojeda-Vinales discussing probable cause and reasonable suspicion necessary to arrest an alien. See U.S. v. Salter, slip op. page 5647 (2d Cir.) 8-15-75; U.S. v. Brignoni Ponce --- U.S. ---, 43 U.S.L.W. 5028, 5032, U.S. June 30, 1975.)

Accordingly, it is respectfully submitted that the Immigration Judge erred in refusing to permit the respondent to testify as to the facts and circumstances surrounding his claimed unlawful arrest. No evi-

dence of a reasonable suspicion was established by the Immigration Service

The only evidence adduced at the deportation hearing was the evidence objected to by the respondent insofar as admissibility was concerned The Immigration Judge totally disregarded the objections to admissibility of this evidence against the respondent, and found him deportable on this testimony.

It is respectfully submitted that the respondent, over objection, did not deny his country of birth, his citizenship or the other allegations contained in the order to show cause. The truth of the allegations would have been conceded, but their admissibility against respondent is what was being challenged; as having been unlawfully obtained subsequent to an illegal arrest.

It is analogous to a criminal defendant admitting that the object which a District Attorney holds up in Court is a revolver or a container of heroin, but contests admissibility against him by reason of an illegal or unlawful arrest and search, and the improper obtention of the evidence. Obviously, no one would deny the actual fact that the revolver is a revolver, or that the blackjack is a blackjack. What is being contested is not the truth of the item's identity (in this case that of the respondent himself), but the admissibility of the evidence challenged by a claim of unlawful arrest without probable cause.

POINT II

AS NO PROBABLE CAUSE NOR ANY REASONABLE SUSPICION WAS ESTABLISHED TO JUSTIFY THE SEIZURE AND ARREST OF THE RESPONDENT, THE RESPONDENT SHOULD HAVE BEEN PERMITTED TO TESTIFY, THE MOTION TO SUPPRESS GRANTED, AND THE PROCEEDINGS TERMINATED.

The Immigration Service has never disputed that the Fourth Amendment to the U.S. Constitution protects aliens as well as citizens. U.S. v. Brignoni-Ponce (Supra); Almeida-Sanchez v. U.S., 413 U.S. 266. At the very least, by reason of the respondent's claim of an unlawful arrest and the absence of probable cause or reasonable suspicion, the respondent should have been afforded an opportunity to testify at the deportation hearing. If respondent's testimony established prima facie lack of reasonable suspicion or probable cause, the burden of proof would then be shifted to the Immigration Service to establish the probable cause and reasonable suspicion necessary to justify the arrest herein.

The Immigration Judge failed and refused to afford the respondent his constitutional right to prove that the government had in fact engaged in the unlawful and illegal activity resulting in his arrest and the obtaining of the information against him.

U.S. v. Brignoni-Ponce (Supra), has now settled that an immigration investigation or detention must be based on "reasonable suspicion". In the instant case there is not a scintilla of evidence as to the basis, probable cause, or reasonable suspicion necessary to have justified the respondent's arrest.

The rights of the respondent are subject to the rule in Terry v. Ohio, 392 U.S. 1, where it was stated that the stopping of a person must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion". The evidence herein, it is respectfully submitted, falls short of the

standards for reasonable suspicion and probable cause. Brinegar v. U.S., 338 U.S. 160, Smith v. U.S., 358 F. 2d 833.

It is elementary that a hunch or conclusion based on good faith may not be sufficient basis for an intrusion into a person's right to be free of illegal search and seizure. Terry v. Ohio, (Supra). There must be more than mere suspicion to justify an arrest. It must be a reasonable suspicion.

If we assume, as asserted by respondent, that the arresting officer never interrogated him at all, did not obtain permission of his employer byt merely - perhaps upon respondent's physical appearance - immediately arrested him; any subsequent statement or admission made after his arrest was violative of his constitutional rights, and should have been suppressed.

The question of alleged illegal police action and its effect on the admissibility of information obtained has been reviewed by the Supreme Court of the United States in the Silverthorne-Nardone-Wong Sun trilogy (Silverthorne Lumber Company v. U.S., 251 U.S. 385; Nardone v. U.S., 308 U.S. 338, and Wong Sun v. U.S., 371 U.S. 471) which cases developed the doctrine known as the "fruit of the poisonous tree".

"Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenr whether these intrusions be termed 'arrests' or 'investigatory detentions' Davis v. Mississippi, 394 U.S. 721, 726-27, 89 S. Ct. 1394, 1397).

Moreover, the Supreme Court stated: "Thus, even if the statement

in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint'. (Wong Sun v. U.S.; 371 U.S. at 486). Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment."

The unlawful stopping of the respondent and his arrest has unveiled the question of whether or not there has been an initial tainting of the respondent's subsequent statements to the arresting officer. It is apparent that the arresting officer exerted a compelling influence over any "voluntary" statements made by the respondent subsequent to his arrest.

Based upon the totality of the circumstances of this case, it should be held that the initial stopping of this respondent and his unwarranted detention created a primary taint that was exploited to induce the respondent's subsequent statements and admissions. There was no evidence adduced to sufficiently dissipate that primary illegality or lack of "reasonable suspicion". This case has established a clear-cut nexus between the primary illegality of the arrest and the subject matter of the respondent's motion to suppress.

The respondent's motion to suppress the evidence and information obtained unlawfully and without reasonable suspicion, should have

been granted.

The respondent also respectfully refers to the recent decision in Illinois Migrant Council et al v. Pilliod, et al. (DD-Chicago) District Court, Northern District Illinois, Eastern Division, #74 C 3111 (7/29/75), where the Court granted a preliminary injunction against INS-Chicago, restraining it from mass raids on factories, dormitories and from stopping people on the street just because (in that case) they looked Mexican and with little or no probable cause. There is a full discussion on INS authority as against the protection of the Fourth Amendment, citing inter alia, Terry v. Ohio (Supra) and U.S. v. Brignoni-Ponce (Supra).

Also see U.S. v. Karathanos, Eastern District, New York, #75-456 (8/1/75). There the Court granted a motion to suppress evidence taken in an INS raid of premises where illegalaliens were found. Defendants having been charged with harboring and concealing under 8 USC 1324, the Court determined that the affidavit of INS investigator, which was the basis of Federal Magistrate's search warrant, was insufficient to show probable cause with a discussion by the Judge of what constitutes probable cause.

CONCLUSION

It is respectfully submitted that by reason of the above, and in view of the refusal of the Immigration Judge to permit the respondent to testify as to the facts and circumstances of an illegal and unlawful arrest without probable cause or reasonable suspicion; his motion to suppress should have been granted, and the proceedings terminated.

Respectfully Submitted,

DAVID E. OLTARSH
225 Broadway
New York, N. Y. 10007

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A21 055 475 - New York

In the Matter of:)

ANGEL DONAY ALVARADO-Santos) In Deportation Proceedings

Respondent)

CHARGE: I &N Act - Section 241(a)(2) - Entered without inspection.

APPLICATION: Voir dire on claim of unlawful arrest and lack of probable cause; in alternative, voluntary departure.

In Behalf of Respondent:

David F. Oltarsh, Esq.
225 Broadway
New York, New York

In Behalf of Service:

John P. Ruggiero, Esq.
Trial Attorney
New York, New York

ORAL DECISION OF IMMIGRATION JUDGE OCTOBER 21, 1975

Respondent testifies that, as alleged in the Order to Show Cause, he is an alien, a native citizen of El Salvador, that he entered the United States near San Ysidro, California, approximately July 15, 1974 and at that entry he was not inspected by the American Immigration. These facts establish that respondent is deportable as charged in the Order to Show Cause for having entered this country without inspection.

There is not a scintilla of evidence that any of respondent's acknowledgements are without foundation or that they are not in accord with fact. Through counsel respondent indicates he had been arrested, seized, searched, without warrant and/or reasonable or probable cause.

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Through counsel respondent requests opportunity for a voir dire on these claims.

It must be remembered that this deportation proceeding is not a criminal proceeding. Respondent's deportability has been patently and unqualifiedly established from respondent's own mouth. He is an adult, age 23.

We have declined to afford counsel the voir dire he seeks in the vast, vast majority of his deportation cases in order to prolong the record thereby achieving delay. Thereafter an appeal follows, and further delay.

If deportability be established, and as already indicated it has been established, respondent seeks voluntary departure. Nothing indicates that he is not eligible for that privilege which, as a matter of discretion, will be granted. However, should respondent not exercise that privilege as required deportation will be ordered. Respondent designates El Salvador as his deportation destination.

ORDER: IT IS ORDERED that in lieu of an order of deportation respondent be granted voluntary departure without expense to the government on or before November 21, 1975 or any extension beyond such date that may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following Order shall thereupon become immediately effective: Respondent shall be deported from the United States to El Salvador on the charge contained in the Order to Show Cause.

Edward P. Emanuel

EDWARD P. EMANUEL
Immigration Judge

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IMMIGRATION JUDGE TO RESPONDENT THROUGH OFFICIAL INTERPRETER:

Q Sir, which language do you speak and understand best please?

A Spanish.

Q The gentleman seated to your right through whom I talk to you is the official interpreter in that language. He will translate all the questions and other matters at this hearing. If there be anything you do not fully understand let me know immediately. Do you understand?

A Yes, sir.

Q Stand up please and raise your right hand to be sworn. Do you solemnly swear that all statements you make in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A I do.

Q You may sit down again. What is your real name please?

A My real name is Angel Donay Alvarado-Santos.

Q Is Mr. David Oltarsh, the gentleman seated at your left, your lawyer in your immigration case?

A Yes.

Q How old are you Mr. Alvarado?

A I am 23.

Q Immigration claims that you are a deportable alien because you entered this country without being inspected by American Immigration. Do you understand?

A Yes.

Q This proceeding is to find out whether or not you are deportable

TRANSCRIPT OF HEARING

and if you are what must be done in your case. Do you understand?

A Yes, sir.

IMMIGRATION JUDGE: Mr. Oltarsh the original Order to Show Cause is received as Exhibit 1.

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Alvarado, are these things Immigration says about you each true. First, that you were born in El Salvador and are a citizen of El Salvador?

MR. OLTARSH: Objection at this time your honor. I have previously served upon the Immigration Service a notice that the respondent asserts a claim that he was seized and arrested without any justification.

IMMIGRATION JUDGE: Are you asking that this be received into evidence?

MR. OLTARSH: Yes, sir.

IMMIGRATION JUDGE: All right, we will receive that as Exhibit 2 after showing it to the Trial Attorney.

MR. OLTARSH: I would just like to say that I object to the question at this time and request your Honor's permission to interrogate the alien preliminarily as to the facts underlining and surrounding his arrests in order that it may be determined whether there is sufficient proof to shift the burden of proof to the government as justifying grounds of his arrest.

IMMIGRATION JUDGE: The objection is overruled. We will proceed on the Order to Show Cause at this time and may give consideration later to your additioanl request

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Alvarado?

MR. OLTARSH: Wait a minute. May I just say this your Honor. I noted my objection, or subject to my objection and an opportunity to include the strong request for the respondent to testify I will permit, however, the respondent to answer the questions under the terms of and subject to that objection.

IMMIGRATION JUDGE: Your objection has already been noted on the record Mr. Oltarsh.

MR. OLTARSH: Thank you. JA

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Alvarado, are these things which Immigration claims about you each true. First, that you were born in El Salvador and that you are a citizen of El Salvador?

A Yes.

Q Is it also true, as Immigration asserts, that you are not a United States citizen; is that true?

A That is true I am not.

Q That you entered the United States near San Ysidro, California which is along our Mexican Border, approximately July 15, 1974?

A Yes.

Q Is it also true Mr. Alvarado, as Immigration claims, that at that time that you were not inspected by American Immigration; is that true?

A I was not.

IMMIGRATION JUDGE: Mr. Oltarsh.....

MR. OLTARSH: Yes, sir.

IMMIGRATION JUDGE: Do you wish to concede your client's deportability as charged in the Order to Show Cause?

MR. OLTARSH: No sir, I do not concede his deportability.

IMMIGRATION JUDGE: Mr. Ruggiero do you have anything further to present on the deportability issue?

MR. RUGGIERO: No, sir.

IMMIGRATION JUDGE: Mr. Oltarsh is there a request for discretionary relief from deportation?

MR. OLTARSH: Yes, I would make an application for voluntary departure but under the reservation or subject to the motion on the offer that I have made previously to interrogate the respondent to elicit testimony surrounding the fact and circumstances of his arrest. But I would, in answer to your question, at some stage of this proceeding request voluntary departure on behalf of the respondent.

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Alvarado, subject to other requests and other applications your lawyer has indicated that if youare ultimately found to be deportable that you ask to be excused from deportation by being allowed to leave this country by yourself, without cost to the government, a privilege called voluntary departure. Do you understand?

A Sir, I came here with this lawyer and I paid this lawyer and I expect that this lawyer will defend me and I don't think that I should be in a position to have to pay my way out of the country because I want to stay in this country. That is my sole purpose of retaining a lawyer.

Q Please do no worry merely because of this question; it must be asked everyone. In the event, I will repeat, if, in the event that you have to be deported to which country you wantto be sent?

A To my country, to no other country.

Q Are you saying to El Salvador?

A Yes, El Salvador of course.

IMMIGRATION JUDGE: Mr. Oltarsh do you wish to proceed on the voluntary departure issue?

MR. OLTARSH: Yes sir, thank you.

MR. OLTARSH TO RESPONDENT:

Q Mr. Alvarado, if you were granted discretionary relief by the court of being able to voluntarily depart the United States at no cost to the United States Government would you comply with such an obligation to leave by a certain date?

A Sir, I mean if that is the case, I understand your question- - -

Q Well, I was only questioning your - - -

IMMIGRATION JUDGE: Now wait a second Mr. Oltarsh, you might understand Spanish. Idon't.

MR. OLTARSH: I don't. I heard a long statement, that is all.

IMMIGRATION JUDGE: I heard a long statement also.

A If that be the case what is the use of an attorney. My boss retained an attorney to defend me. He expected that I would stay in the country. Otherwise I would have paid my own passage and leave without an attorney.

MR. OLTARSH TO RESPONDENT:

Q That is all that I am asking him. That is all that I am asking you.

If you are granted the discretionary relief of leaving the country at some date in lieu of deportation would you do it if you have to do it?

A I would.

Q Now Mr. Alvarado-Santos, aside from your arrest or seizure by officials of the Immigration Service sometime in September in 1974 have you ever been arrested in any country in the world prior to that date or up to the present time?

A No, sir.

Q Are you a member or have you ever been a member of the communist party?

A No, sir.

Q In connection with your work sir, I assume that you work. Do you pay income taxes and other taxes withheld out of your salary?

A Yes, sir.

MR. OLTARSH: I have no further questions.

IMMIGRATION JUDGE: Mr. Ruggiero?

MR. RUGGIERO: Yes, sir.

IMMIGRATION JUDGE: You may proceed if you have anything to present.

MR. RUGGIERO: Yes, I do.

MR. RUGGIERO TO RESPONDENT:

Q Sir, in getting across the border from Mexico to the United States did you pay someone to help you do that?

A Yes, sir.

Q And how much money did you pay?

A I paid him 250 .

IMMIGRATION JUDGE TO RESPONDENT:

Q Are you saying $250 American dollars? Is that what you are saying?

A Yes, American dollars.

MR. RUGGIERO TO RESPONDENT:

Q And when you paid this man these 250 American dollars did he then take you across the border from Mexico to the United States?

A Yes.

MR. RUGGIERO: I have no further questions.

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Alvarado, do you have any close family or relatives who are citizens or legal residents of the United States?

A I have neither relatives nor family in this country. I am the only one here.

BY IMMIGRATION JUDGE: We are cognisant of the of the motion, the objection and the offer of Mr. Oltarsh. Likewise familiar are we with Exhibit 2. We will now state our decision. However before so doing we will set forth what has been established in these proceedings.

B MR. OLTARSH: May I interrupt for one moment your Honor. I ask at this time for an opportunity to interrogate the respondent if your Honor is not going to grant me that opportunity I believe that for the record I should be granted an opportunity to briefly state and offer proof as to what the alien would testify and what I intend to prove so that at least there is a record of what the alien had been offering or would offer on the question. May I state an offer of proof in the absence of being permitted to question the

respondent.

IMMIGRATION JUDGE: No, sir.

MR. OLTARSH: I may not even state anything to do with the basis of his arrest or seizure?

IMMIGRATION JUDGE: No, sir.

MR. OLTARSH: There was claim that he was seized without any conversation, inquiry, permission to enter the restaurant or any discussion whatsoever. He was merely seized without a word and put in handcuffs and taken right to Immigration.

NOTE: At this point in the proceedings the Immigration Judge delivered an oral statement of his decision in this matter. This has been transcribed separately and is attached. * * * * * * * * * * * * * * *

MR. OLTARSH: I note my objection. May I just note it for the record.

IMMIGRATION JUDGE: Your objection is noted.

MR. OLTARSH: And not being afforded an opportunity to state an offer of proof.

IMMIGRATION JUDGE: Your objection is noted sir. 7B

MR. OLTARSH: Thank you sir.

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Alvarado, the interpreter shall have translated my two orders verbatim. Do you understand what they say?

A As I attempted to say before I am a little bit disappointed because I didn't expect to be sent back to my country so soon. I have a wife here. She is pregnant and, you know, I am in fear of leaving her now I have to go back to my country just like that.

Q Do you understand my several orders? Do you understand that?

A Yes, sir.

IMMIGRATION JUDGE: Mr. Oltarsh, what are your wishes about appeal please?

MR. OLTARSH: I wish to appeal.

IMMIGRATION JUDGE: Pardon?

MR. OLTARSH: I say not a final order. I wish to appeal.

IMMIGRATION JUDGE: Do you wish to appeal here and now are you asking for a period of ten days to perfect an appeal?

MR. OLTARSH: I am asking for a period of ten days. All that I am saying is that we don't accept it as a final order.

IMMIGRATION JUDGE: All right, you have anitl October 31, 1975, Mr. Oltarsh, to appeal. Here are the appeal forms in triplicate which must be filed with the required fee by no later than October 31, 1975, otherwise you no longer will have the right to appeal. Do you understand?

MR. OLTARSH: Yes, sir, I understand.

MR. RUGGIERO: The government waives appeal, sir.

IMMIGRATION JUDGE: Hearing closed.

I hereby certify that to the best of my knowledge and belief the foregoing pages numbered 1 through 9 are a complete and accurate transcript of the above-described proceedings.

Signature

Transcriber

Title

TRANSCRIPT OF HEARING

FORM I-299 (9-28-65)

United States Department of Justice — Immigration and Naturalization Service

A-28

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

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In the Matter of

ANGEL DONAY ALVARADO-SANTOS
(A21 055 475),

Respondent.

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

PLEASE TAKE NOTICE that the undersigned will move that the Immigration Service arrested, seized and/or searched the respondent without a warrant and/or without reasonable or probable cause. The Service will be called upon to assume the burden of justifying the basis and facts upon which it took respondent into custody. The respondent serves notice herewith that he wishes to give sworn testimony at the hearing upon his personal knowledge of the facts which show the illegal arrest, seizure and/or search.

The undersigned hereby demands a hearing on a proposed motion to suppress the evidence resulting from the claimed illegal, arrest, seizure and/or search. On the date in question, the undersigned avers that he was seized and arrested by Immigration officers while working in a restaurant and with no probable cause. The Immigration officers failed t o elicit sufficient information concerning any illegal status of the respondent in the United States prior to arresting or seizing him. The

undersigned moves to suppress all the information resulting from the said illegal arrest because it was elicited under duress and as the result of an illegal arrest without offering the undersigned Miranda warnings as required by the United States Supreme Court.

The respondent herewith also demands that the arresting officers be subpoenaed and produced at the hearing because respondent wishes to question them as their testimony is relevant and material to the issue of the unreasonable arrest, seizure and/or search which was made without probable cause.

Under the Freedom of Information Act, Sec. 552(b)(7) and such other portions of the Act as may be applicable herein, all notes and memoranda relating to this case and which formed any basis for the detention and seizure of respondent are demanded to be produced or the attorney for respondent be permitted to inspect the same. Also demanded are the mmes and addresses of any alleged informants relating to the said detention and seizure of the respondent.

Angel Donay Alvarado-Santos

Sworn to before me this

1ST day of ~~September~~ OCTOBER, 1975

DAVID E. OLTARSH
Notary Public, State of New York
No. 30-8218270
Qualified in Nassau County
Commission Expires March 30, 1976

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA

File No. A21 055 475

In the Matter of ALVARADO-SANTOS, Angel Danny

Respondent

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of El Salvador and a citizen of El Salvador;
3. You entered the United States ~~at~~ near San Ysidro, California on or about 7/15/74 (date);
4. You were not inspected by the United States Immigration and Naturalization Service.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, you entered the United States without inspection.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 136 Flushing Avenue, Brooklyn, N.Y.

on Sept. 22, 1975(S) at 1:00 p.m. and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: Sept. 19, 1975

Stanley E. Gilbert
(Signature and title of examining officer)
ASSISTANT DISTRICT DIRECTOR
FOR INVESTIGATIONS, N.Y., N.Y.
(City and State)

Form I-221S (12-1-73)

A-31

(2)

COPY RECEIVED

Robert C. Fisk Jr.

UNITED STATES ATTORNEY

1/20/77

Marian L. Bryant